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No. 321

In the Supreme Court of the United States

October Term, 1951

THE UNITED STATES OF AMERICA, APPELLANT

v.

WILLIAM RANDOLPH SCHEFFER

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 621

THE UNITED STATES OF AMERICA, APPELLANT

v.

WILLIAM RANDOLPH SCHARTON

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The memorandum opinion of the District Court (R. 7) has not been reported.

JURISDICTION

The judgment to be reviewed was entered November 20, 1931 (R. 7). An appeal to this Court was allowed on December 17, 1931 (R. 7–8). The jurisdiction of this Court to review by direct appeal the judgment involved is conferred by the Act of March 2, 1907, c. 2564, 34 Stat. 1246 (U. S. C., Title 18, Sec. 682), and by Section 238 of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Does the crime of attempting in any manner to evade or defeat any tax imposed by the Revenue Act of 1926 or the payment thereof, as defined by Section 1114(b) of the Revenue Act of 1926, constitute an offense "involving the defrauding or attempting to defraud the United States or any agency thereof * * * in any manner" within the meaning of Section 1110 (a) of that Act prescribing a six-year statute of limitations for such offenses?

STATUTE INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9, 114–115, 116–117:

> SEC. 1110. (a) The Act entitled "An Act to limit the time within which prosecutions may be instituted against persons charged with violating internal-revenue laws," approved July 5, 1884, as amended, is reenacted without change, as follows:
>
> "That no person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense: *Provided*, That for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, the period of limitation shall be

six years, but this proviso shall not apply to acts, offenses, or transactions which were barred by law at the time of the enactment of the Revenue Act of 1924: * * *" (U. S. C. Sup. V, Title 18, Sec. 585.)

SEC. 1114. (b) Any person required under this Act to collect, account for and pay over any tax imposed by this Act, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this Act or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution. (U. S. C. Sup. V, Title 26, Sec. 1266.)

(c) Any person who willfully aids or assists in, or procures, counsels, or advises, the preparation or presentation under, or in connection with any matter arising under, the internal-revenue laws, of a false or fraudulent return, affidavit, claim, or document, shall (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document) be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution. U. S. C. Sup. V, Title 26, Sec. 1267.)

STATEMENT

On August 18, 1931 (R. 6) appellee was indicted in the United States District Court for the District of Massachusetts under Section 1114 (b) of the Revenue Act of 1926, *supra*. The indictment contained two counts, the first charging an attempt to defeat and evade an income tax for the year 1926 in the sum of $10,708.03 by falsely understating taxable income for that year (R. 1–3), and the second charging an attempt to defeat and evade an income tax for the year 1927 in the sum of $13,972.58 by falsely understating taxable income for that year (R. 3–6).

On September 4, 1931, appellee filed a "plea in bar" praying that he be dismissed and discharged and that the indictment be quashed on the ground that the offenses were alleged to have been committed on March 11, 1927, and April 16, 1928, respectively, which in each instance was more than three years before the finding of the indictment. (R. 6–7.) On November 20, 1931, the court held that the offenses charged did not involve "the defrauding or attempting to defraud the United States or any agency thereof," and, therefore, that the three-year period and not the six-year period of limitations prescribed in Section 1110 (a) of the Revenue Act of 1926, *supra*, applied. In accordingly entered an order sustaining the plea in bar and quashing the indictment. (R. 7.) The Government thereupon took this appeal. (R. 7–8.)

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred (R. 9)—

1. In sustaining appellee's plea in bar.

2. In holding that the offenses charged did not involve the defrauding or attempting to defraud the United States or any agency thereof within the meaning of the first proviso of Section 1110 (a) of the Revenue Act of 1926, *supra,* and that the six-year period of limitations provided therein did not apply.

3. In holding that the three-year period of limitations prescribed by Section 1110 (a) of the Revenue Act of 1926, *supra,* applied.

SUMMARY OF ARGUMENT

An attempt to obstruct or defeat the lawful functions of any department of the Government, to cheat the Government out of property or money which it possesses, or to which it is entitled, constitutes an attempt to defraud the United States, where the attempt is by means of deceit, craft, trickery, misrepresentation, or chicanery. An attempt to defeat and evade a tax is an attempt to deprive the Government of money to which it is entitled and obstructs a function which is vital to the very existence of government. "Evade" and/or "defeat" implies deceit, craft, trickery, misrepresentation, and an intent to defraud. Therefore an attempt to defeat and evade a tax is an attempt to defraud the United States. It

follows that fraud is an ingredient of the offense of attempting to defeat and evade a tax, and therefore the six-year statute of limitations prescribed by the first proviso of Section 1110 (a) of the Revenue Act of 1926, *supra,* applies.

ARGUMENT

THE SIX-YEAR STATUTE OF LIMITATIONS PRESCRIBED IN SECTION 1110 (A) OF THE REVENUE ACT OF 1926 APPLIES TO THE PRESENT CASE

Section 1110 (a) of the Revenue Act of 1926, *supra,* provides:

> That no person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense: *Provided, That for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, the period of limitation shall be six years* * * *. (Italics ours.)

Section 1114(b) of the same Act, *supra,* declares that—

> Any person * * * who willfully attempts in any manner to evade or defeat any tax imposed by this Act or the payment thereof, shall * * * be guilty of a felony * * *.

The question presented is whether the offense thus defined involves "the defrauding or attempting to defraud the United States or any agency thereof," within the meaning of Section 1110(a), *supra*.[1]

It is well settled that attempts to obstruct or defeat the lawful functions of any department of the Government of the United States (*Haas* v. *Henkel*, 216 U. S. 462, 479–480; *United States* v. *Plyler*, 222 U. S. 15, 17; *United States* v. *Walter*, 263 U. S. 15, 18; *Curley* v. *United States*, 130 Fed. 1, 11, certiorari denied (C. C. A. 1st), 195 U. S. 628) or to cheat the Government out of property or money which it possesses (*United States* v. *Foster*, 233 U. S. 515, 525–526; *United States* v. *Keitel*, 211 U. S. 370, 393–394; *Hyde* v. *Shine*, 199 U. S. 62, 82–83) or to which it is entitled (*Capone* v. *United States*, 51 F. (2d) 609, 615 (C. C. A. 7th), certiorari denied, 284 U. S. xviii; *United States* v. *Stone*, 135 Fed. 392, 399 (N. J.)) constitute *attempts to defraud the United*

[1] This question is one of first impression in this Court, and so far as the Government has been able to ascertain has not been passed upon by any Circuit Court of Appeals. Several District Courts, in unreported decisions rendered without opinions, have adopted the construction for which the Government contends. An examination of the legislative history of the statutory provisions involved throws no light on the proper construction except that it appears from S. R. 398, 68th Cong., 1st sess., p. 44, that the proviso was inserted in Section 1110 (a) to bring the limitations in that section into harmony with the general limitation provisions of R. S., Section 1044 as amended.

States where the attempts are by means of deceit, craft, trickery, misrepresentation, chicanery, or other dishonest methods or schemes (*Hammerschmidt* v. *United States,* 265 U. S. 182, 188). That an attempt to evade or defeat a tax due the Government is tantamount to, possesses every element of, and constitutes an attempt to defraud the United States, is at once apparent. An attempt to defeat or evade a tax involves not only an attempt to deprive the Government of property or money to which it is entitled (*Capone* v. *United States,* 51 F. (2d) 609, 615 (C. C. A. 7th)) thus causing it pecuniary loss, but it also obstructs the collection of the revenue which "is essential to the very existence of government" (*McCulloch* v. *Maryland,* 4 Wheat. 316, 428). "Evasion" implies avoidance by device or strategy or concealment where good faith requires disclosure (see *Murray* v. *Brotherhood of Am. Yeomen,* 180 Iowa 626, 648; *State* v. *Bernstein,* 129 Iowa 520, 522); and "intent to defeat" is equivalent to "intent to defraud" (*Laing* v. *Slingerland,* 12 Ont. Pr. 366). No resort to lexicographers is necessary, for the plain and natural meaning of an attempt to evade or defeat any tax imposed by the United States necessarily involves an attempt to defraud the United States. Other acts may also constitute attempts to defraud the United States, but an attempt to evade or defeat the taxes without which government could not exist certainly does.

The courts and the Board of Tax Appeals have continuously treated any attempt to evade or defeat

a tax as an offense involving fraud. In *Levy* v. *United States,* 271 Fed. 942 (C. C. A. 3rd), the defendant was charged in one count with perjury and in another with having attempted to defeat and evade an income tax by the filing of a false amended return. In distinguishing between the two offenses the court said (p. 943):

> While falsity in the amended return was an element of the offense, perjury was not involved; the essence of the offense was an act with intent, together amounting to an attempt, to defeat and evade a tax assessment by a false and *fraudulent* return. (Italics ours.)

In *Emmich* v. *United States,* 298 Fed. 5, (C. C. A. 6th), the court considered an indictment charging an attempt to defeat and evade a tax, and in considering the nature of the offense said (p. 9):

> The real character of the offense lies, not in the failure to file a return, or in the filing of a false return, but rather in the attempt to *defraud* the government by evading the tax. (Italics ours.)

In *Guzik* v. *United States* (C. C. A. 7th, No. 4533), decided December 10, 1931, reported in Prentice-Hall Fed. Tax Service (1932), Vol. 1, p. 391, 392 (pending before this Court on petition for certiorari, No. 680, October Term, 1931), the court had before it an indictment similar to that considered in the *Emmich* case, and concerning the nature of the offense stated:

> The crime is complete when the taxpayer, as here alleged, knowingly and willfully files a *fraudulent* tax return with intent to evade or defeat a part, or all, of his tax. (Italics ours.)

In *Capone* v. *United States, supra,* in speaking of the reason for the 1918 amendment of Section 35 of the Criminal Code (U. S. C., Ttitle 18, Sec. 80), the court said (p. 614):

> The amendment was enacted a few years after the passage of the Revenue Act calling for the payment of income taxes, and assessment and collection of which supplied a fertile field *for the practice of fraud by those who would so evade federal taxes.* Such increased opportunity for *fraud* upon the government might account for the action of Congress in passing the amendment. (Italics ours.)

In *United States* v. *LaFontaine* (D. C. Md.) (December 4, 1931), reported in C. C. H. (1931), Vol. III, p. 9326, 9328, in passing sentence upon a plea of guilty to an indictment charging an attempt to evade and defeat a tax, the court said with relation to the nature of the offense:

> But nevertheless the resultant act, whatever the motive, was in fact an *attempt to defraud the Government* of taxes legally due. (Italics ours.)

It seems clear from the plain language of the statute and the authorities that an attempt to defraud the United States is always an ingredient

of the offense of attempting to evade and defeat a tax under Section 1114(b), *supra*. Where an attempt to defraud the United States is an ingredient of the offense such offense falls under the proviso of Section 1110(a), fixing a six-year period of limitation. See *United States* v. *Noveck*, 271 U. S. 201, 204. In the *Noveck* case this Court had before it the provision of Section 1044 of the Revised Statutes as amended by the Act of November 17, 1921, c. 124, 42 Stat. 220, which, like Section 1110(a) here involved, prescribed a six-year period of limitations for "offenses involving the defrauding or attempts to defraud the United States." With relation to such statute this Court said (p. 204):

> Its purpose is to apply the six-year period to every case in which defrauding or an *attempt to defraud the United States is an ingredient* under the statute defining the offense. (Italics ours.)

It is therefore submitted that the offense of willfully attempting "in any manner to evade or defeat any tax" involves the "defrauding or attempting to defraud the United States" and that the six-year statute of limitations applies.

This position is strengthened by the fact that subdivision (c) of Section 1114, *supra*, makes it a felony for any person to aid, assist, procure, counsel, or advise "the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a false or *fraudulent return*, affidavit, claim, or document."

Such a return could not be "fraudulent" unless it was intended to defraud, and it very obviously could defraud only the Government. It would therefore seem to be clear that the crime of aiding, assisting, procuring, counseling, or advising the preparation of a "fraudulent return" is an offense "involving the defrauding or attempting to defraud the United States" within the meaning of Section 1110 (a) providing a six-year statute of limitations. It is scarcely conceivable that Congress intended to prescribe a six-year statute of limitations for one who aids, assists, procures, counsels, or advises the preparation of a "fraudulent return" but only a three-year statute of limitations for the principal offender punishable under Section 1114 (b) providing exactly the same punishment for each.

CONCLUSION

The decision of the court below is erroneous and should be reversed.

Respectfully submitted.

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